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No. 227

In the Supreme Court of the United States

October Term, 1957

ANNI H. J. E. OEHMICHEN, PETITIONER

v.

HERBERT BROWNELL, JR., Attorney General, and as successor to the Alien Property Custodian

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The District Court wrote no opinion.[1] The opinion of the Court of Appeals for the District of Columbia Circuit is reported at 243 F. 2d 637.

JURISDICTION

The judgment of the Court of Appeals was entered on February 28, 1957. A timely petition for rehearing was denied on March 29, 1957. The peti-

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[1] The District Court's findings and conclusions appear in the joint appendix (J.A.), as filed below, at pp. 21-28.

tion for a writ of certiorari was filed on June 26, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, on the facts, the court below correctly concluded that petitioner voluntarily returned to enemy territory during World War II and became resident within such territory for purposes of the Trading with the Enemy Act.

2. Whether "enemy status", once acquired, is lost, for purposes of the Trading with the Enemy Act, by a removal of a person from enemy territory while a state of war still continues.

STATUTES INVOLVED

Sections 2(a) and 9(a) of the Trading with the Enemy Act are set forth in Appendix B to the petition for a writ of certiorari.

STATEMENT

This suit was brought under Section 9(a) of the Trading with the Enemy Act to recover property vested by the Attorney General under that Act. The evidence may be summarized as follows:

Petitioner is the widow of Erhard Oehmichen, a citizen of Germany, who died in that country in 1948 (J.A. 21) and left his property to her by will (J.A. 21.) Erhard Oehmichen had entered the United States for permanent residence from Tokyo, Japan, in 1933 (J.A. 128). Petitioner married him in Eng-

land in 1934, and then entered the United States for permanent residence.

In the United States, Oehmichen engaged in the importing business, largely of wines and beers from Germany, first in Chicago, and later in New York (J.A. 34). Petitioner served as a director of one of his corporations and worked in the office (J.A. 35, 91).

In the course of his importing business, Oehmichen maintained a number of German contacts, business and social. One of his attorneys in New York was a man named Topken, who did legal work for the German consulate there (J.A. 91). In Chicago, he became well acquainted with one Tannenberg, connected with the German consulate and later with the Embassy in Washington (J.A. 78).

In 1939 and 1940, Oehmichen took a leading part in organizing and operating the Casino of Nations, a restaurant at the New York World's Fair which, according to him, was "held universally as the official German Exposition Place" (J.A. 177).

In March, 1942, Oehmichen and his wife were arrested as enemy aliens (J.A. 32). Petitioner was released the next day, but her husband was taken to Ellis Island, where he was detained (J.A. 96). After a hearing before an Alien Enemy Control Board at which he and his wife testified and witnesses were heard on his behalf, he was told that he would be interned for the duration of the war (J.A. 41).

Instead of being transferred immediately to an internment camp, Oehmichen, at his own request, was

permitted to stay at Ellis Island for 10 months (J.A. 91). While he was there, his wife visited him once a week and he was allowed to telephone her on two or more occasions (J.A. 76, 92). When petitioner became ill during the summer of 1942, her husband, accompanied by a guard, was allowed to visit her several times a week in their apartment (J.A. 92).

In May, 1942, while at Ellis Island, Oehmichen executed his first request that he and his wife be repatriated to Germany "[i]n the event of my internment" (J.A. 132). In July, 1942, the Oehmichens wrote two letters to the Department of State requesting repatriation (J.A. 138-139). Later, in September, 1942, while petitioner was ill, Oehmichen sent other letters requesting repatriation (J.A. 142, 143).

In December, 1942, Oehmichen was transferred to an internment camp at Crystal City, Texas. It was a "family camp," and petitioner joined him as a voluntary internee (J.A. 45, 52, 84).

While the Oehmichens were there, the Crystal City camp housed a large number of internees, sixty per cent of them Japanese and forty per cent German (J.A. 105). The authorities maintained a school system through high school, accredited by the State Board of Texas (J.A. 107), and a German school for the children of the internees who planned to return to Germany (J.A. 110). There was a thirty-bed hospital with a medical staff headed by a major of the Public Health Service and including several German and Japanese medical men from among the internees (J.A. 107).

The housing at the camp consisted of bungalows, for people with children, and shelters for the others (J.A. 106). The Oehmichens at first shared a bungalow with another couple, and later had a place to themselves in the shelter area (J.A. 79). The internees received an allowance from the Government for food and clothing, and the food was very good (J.A. 79-80, 84). The internees could also purchase things outside, and the camp had a store, a canteen, and, for the German internees, a beer garden (J.A. 80).

The internees were not required to work, but those who wanted to do so were given an opportunity to work as carpenters, mechanics, maintenance men, or farmers, or to work in the store (J.A. 54). While at the camp, Oehmichen did not apply for work, and spent most of his time playing tennis or badminton or sitting around (J.A. 106-107). He did, however, teach school for a while, but in 1943 trained teachers from a German school in Costa Rica arrived in the camp, and Oehmichen was forced out, allegedly because of a dispute in regard to teaching about Einstein (J.A. 54, 56). The camp authorities provided a wide range of recreational facilities including movies, a large swimming pool, and sports (J.A. 106). Reading matter was available, and some of the internees, including Oehmichen, played bridge (J.A. 80). The Oehmichens had a garden, a radio, a movie projector and films, and had had their dog sent down from New Jersey (J.A. 80).

For the most part, according to petitioner's testimony, they lived contentedly in the camp, except when rumors of possible repatriation excited them

(J.A. 83). The only complaint they made to the authorities of mistreatment by fellow internees related to an altercation between Oehmichen and two of the butchers in the camp store, during which his glasses were broken and his shirt torn (J.A. 82). That occurred about October of 1943 when some of the German internees, apparently the more pro-Nazi element, attempted to put through a "Camp Constitution" and created considerable contention and excitement. During the same period, a stone was thrown at Oehmichen on one occasion, there was an attempt to strike him (J.A. 81), and he was shouted at (J.A. 55).

Except for these incidents occurring in about October, 1943, there appear to have been no attempts to harm Oehmichen or threats directed to him. According to petitioner, however, he was afraid of the pro-Nazi internees, although she felt safe in the camp (J.A. 120). She also testified that on occasion he was moody and depressed, and sometimes irrational (J.A. 59, 60-61, 64).

While the Oehmichens were at Crystal City he declined to be considered for a transfer to another camp (J.A. 178-179), and later stated that he would not accept parole (J.A. 148).

In all, the Oehmichens made about a dozen written requests for repatriation, about half of them before they arrived at Crystal City and the others while they were there (J.A. 132, 136, 138, 140, 143, 144, 145, 146, 147, 180. See also J.A. 138 and 154). In addition, Oehmichen made at least one personal appeal (in February, 1944) to Mr. Kelly, the Assistant Commissioner of Immigration (J.A. 109). At that time,

he also talked with Dr. Fehr, of the Swiss legation[2] in an effort to get their names added to the list for repatriation (J.A. 180). In an earlier appeal to Dr. Fehr, on May, 1943, he had written a letter urging the repatriation of himself and his wife, and had asked Dr. Fehr to "establish communication by telephone with Mr. Tannenberg[3] in order to effect exchange with the next opportunity" (J.A. 177).

Whether as a result of these appeals, or for some other reason,[4] the names of the Oehmichens appeared on a list of persons proposed for repatriation by the German Government in November, 1944 (J.A. 181-183), and they were notified on Christmas Day that they would be repatriated (J.A. 64).

When the Oehmichens were interned, and later when they sailed for Europe, they left some of their belongings in storage in the United States (J.A. 23). According to petitioner, they intended to live in Germany for the duration of the war and until the immigration authorities should permit them to re-enter the United States (J.A. 139). They did not know when they left how long the war would last (J.A. 67, 77);[5] what they wanted to do was to find a place

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[2] Switzerland was the "Protecting Power" for German interests (J.A. 78, 110).

[3] The German diplomat Oehmichen had known in Chicago (J.A. 78).

[4] In the 1944 letter Oehmichen said they had been trying to be repatriated since April, 1942 (J.A. 180).

[5] When they left the United States the Battle of the Bulge was raging. It was Germany's last great offensive but no one could have known that at the time. The Battle of the Bulge began on December 16, 1944 and ran until at least

where they would not have to "bother about anything till the war was over", where they could "sit out the war" (J.A. 32, 51, 77).

The Oehmichens sailed early in January, 1945, on the "Gripsholm" and arrived in German-held territory about January 29, along with several hundred others (J.A. 64, 66). The German Government furnished them with ration coupons and 100 or 200 marks apiece, and also with railroad tickets to their home towns (J.A. 88). The Oehmichens, however, liked Bregenz, Austria, and they obtained a permit to live there indefinitely. They remained there until October, 1945 (J.A. 84).

While living at Bregenz, Oehmichen made a train trip to Hamburg and Dresden to inquire about relatives and to borrow money from his wife's father (J.A. 85). On this trip, he sold, for 5000 marks, two pounds of coffee, which he had bought on the boat. The Oehmichens also traded coffee for butter despite rationing regulations (J.A. 84-85). According to petitioner, they had arrived in Bregenz without funds. For a while they boarded with a private family, and, after Oehmichen's return from Dresden, they rented a "chalet" or farmhouse in the mountains near the town (J.A. 67, 85).

January 16, 1945. *A Military History of the World War II* (edited by Stamps and Esposito, United States Military Academy, 1953), Vol. I, pp. 507-541. But, according to the petitioner, in "the first days of 1945 . . . the eventual outcome of the war was no longer in doubt" (p. 8). The petitioner also makes the statement that at the time of the first request for repatriation (May, 1942) no one doubted that it would end "in due course" (p. 21).

Oehmichen was arrested in the latter part of April, 1945, as a "political prisoner", but was released about five days later when the Allied forces approached (J.A. 23, 68-69).

The Oehmichens left Bregenz in October, 1945, going first to a resort in Bavaria, then to Hamburg, and finally to Weisbaden in the American Zone where he was employed by the Occupation authorities (J.A. 70-71). He died there May 19, 1948 (J.A. 70-71) of a congenital illness which had been discovered in the hospital at Crystal City (J.A. 127).

In 1948, petitioner went to Switzerland and obtained a visa from an American consul, arriving in the United States as an immigrant in 1949 (J.A. 75). She has since become a citizen of the United States (J.A. 76).

The bulk of the vested property which is the subject of the action consisted of checking accounts in Chicago and Newark banks and was vested in 1947 (J.A. 7-9). In 1950, the shares of stock in one of Oehmichen's corporations were vested (J.A. 9-11) and, in 1951, a claim of the petitioner against that corporation was vested (J.A. 12-14).

The District Court found that the petitioner and her husband requested repatriation in order to free him from internment; that he was highly nervous; and that his life at Crystal City was made uncomfortable by the pro-Nazi majority of the internees, although the camp authorities treated them well (J.A. 22-23). It also found that they intended to return to the United States after hostilities ended and

did not abandon their residence in the United States (J.A. 22, 25).

The court concluded that the threat of a continuance of the unpleasant situation petitioner and her husband experienced as internees did not amount to duress in the sense of a threat to their present or future welfare, but that their requests for repatriation were not the result of a free and intelligent choice (J.A. 26-27); that their physical presence in enemy territory was not a residence volitionally assumed and voluntarily acquired (J.A. 26), and that they did not have the intent required for residence (J.A. 27). It held that they were not "enemies" because they were not "resident within" enemy territory (J.A. 27), and entered judgment for the plaintiff (J.A. 28).

The Court of Appeals reversed, one judge dissenting (Pet. 1a-7a). It held that the Oehmichens were in Germany "by their own free choice" and that "discontent with conditions in a well-run internment camp is not the compulsion which would translate otherwise voluntary repatriation into departure under duress" (Pet. 4a-5a). It pointed out that, if they had had their way, the Oehmichens would have gone to Germany in May, 1942, and it found the explanation that they were compelled by difficulties at Crystal City to return to Nazi Germany "singularly unimpressive" (Pet. 3a, 4a). It also rejected the argument that, under the rule of *Guessefeldt v. McGrath*, 342 U.S. 308, the Oehmichens did not have the requisite intention to make them "resident within" Germany (Pet. 4a).

ARGUMENT

1. The question of the "voluntariness" of the Oehmichens' presence in Germany, *i.e.*, whether petitioner should be relieved of the consequences of the decision to return to Germany for purposes of determining her eligibility to recover property vested under the Trading with the Enemy Act, turns on the particular facts of this case. The decision is without general importance. Indeed, there is not a single pending claim for the return of vested property which involves persons who, like the Oehmichens, (1) were interned while residing in the United States, (2) decided to return to their native country in preference to wartime internment here, and (3) had property in this country which was seized by the Alien Property Custodian.[6]

In any event, the decision of the Court of Appeals is correct and requires no further review. That court, citing *Johnson* v. *Eisentrager*, 339 U.S. 763, 772 *et seq.*, noted that (Pet. 5a):

> Internment is the established international treatment of resident enemy aliens by all civilized countries. The Oehmichens chose to return to an enemy country rather than to undergo that established treatment.

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[6] There are, to be sure, other pending claims for the return of seized property left by internees who returned to their native country in preference to wartime internment in the United States. But these claims, which total less than a dozen in all, are asserted by persons who were shipped to the United States for internment from various Latin-American countries of which they had been residents.

Accordingly, it held that (Pet. 4a-5a):

> * * * mere discontent with conditions in a well-run internment camp is not the compulsion which would translate otherwise voluntary repatriation into departure under duress.

Certainly, internment of an enemy alien in time of war is not wrongful, and does not in and of itself constitute duress.[7] *McGrath* v. *Tadayasu Abo*, 186 F. 2d 766, 773-774 (C.A. 9), certiorari denied, 342 U.S. 832; *Yoshio Murakami* v. *Dulles*, 221 F. 2d 588 (C.A. 9). Since the early days of this nation, it has been the law that in time of war the President may order that the citizens or subjects of enemy nations "be apprehended, restrained, secured, and removed". Alien Enemy Act, as amended, 50 U.S. C. 21. And see *Ludecke* v. *Watkins*, 335 U.S. 160; *United States* v. *Watkins*, 158 F. 2d 853 (C.A. 2); *United States* v. *Clark*, 159 F. 2d 552 (C.A. 7);

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[7] The situation is obviously different when the Government fails to protect the internees and they are put in fear of life and limb. Such was the case in *Acheson* v. *Murakami*, 176 F. 2d 953 (C.A. 9), relied on by petitioner (Pet. 15). There, Murakami's life was threatened (p. 965). In the camp at Tule Lake, there was at least one murder, a man was knifed, men were beaten up, and there was a series of assaults and a general condition of lawlessness, gangsterism and hoodlumism (pp. 962-965). Those conditions were due, the court said in the later case of *McGrath* v. *Tadayasu Abo*, 186 F. 2d 766, 773 (C.A. 9), certiorari denied, 342 U.S. 832, to the action and inaction of the officials responsible for the care of the internees; and it was not unreasonable to apply the ordinary rules as to duress. Internment alone, however, according to the *Abo* opinion, did not entitle the internees to set aside their renunciations of citizenship (p. 773).

Citizens Protective League v. *Clark*, 155 F. 2d 290, 294 (C.A.D.C.), certiorari denied, 329 U.S. 787.

Expatriation cases, like *Dos Reis* v. *Nicolls*, 161 F. 2d 860 (C.A. 1), stated by petitioner to be in conflict with the decision below, are plainly distinguishable. Apart from the fact that such cases deal with loss of citizenship, which is not the same as inelegibility for recovery of seized property, the facts on which relief was granted are significantly different. Thus, the *Dos Reis* case involved a dual national of the United States and Portugal who was compelled, over his protest, to serve in the Portugese army. Here, the Oehmichens were not compelled to return to Germany. They were not deported, and no one attempted to force or even persuade them to go to Germany.[8]

2. The question whether the Oehmichens had the kind of intention which would make them residents of Germany within the meaning of Section 2(a) of the Trading with the Enemy Act is also one which is essentially factual. The Oehmichens went to Germany while the war was flagrant and with the full knowledge that, once in, they could not get out while the war continued. Concededly, they planned to stay there for the duration of hostilities (J.A. 32, 51, 77). The stay they contemplated was

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[8] *Yaichiro Akata* v. *Brownell*, 125 F. Supp. 6 (D. Hawaii), also relied on by petitioner (Pet. 13-14, fn. 2), is likewise distinguishable on its facts because Akata was given to understand that he could only reunite his family, scattered among several relocation and internment camps, if he applied for repatriation (125 F. Supp. at p. 9).

thus indefinite as to time, for they did not know when they left in January, 1945, how long the war would last (J.A. 67, 77).[9] As the court below noted (Pet. 3a):

> The Oehmichens were citizens of Germany and were actually living on German territory during the war. If they had had their way they would have been in Germany for the duration of the war. * * *

On these facts, we think it clear that they were residents and not mere sojourners.

In *Guessefeldt* v. *McGrath*, 342 U.S. 308, this Court discussed the meaning of the term "resident within" and concluded that it "implies something more than mere physical presence and something less than domicile * * * " 342 U.S. 308, 312. Under this language and the legislative history cited by the Court,[10] prisoners of war and "sojourners" are ex-

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[9] That the fighting actually ended in three or four months after the Oehmichens left the United States does not alter the fact that they went to Germany with the intention of sitting it out, no matter how long that might take. When they left the United States, the Battle of the Bulge was raging, and no one could safely predict the outcome or duration of the war. See pp. 7-8, n. 5, *supra*.

[10] As to legislative history, the Court said in *Guessefeldt*, 342 U.S. at 311:

> Legislative history leaves the meaning shrouded. Some use of the term "domicile" as the touchstone of enemy status is to be found in the Congressional hearings and reports. But on the floor, Representative Montague, one of the managers of the bill, unequivocally stated under close questioning that the statutory language was intended to cover much more than those domiciled

cluded. The statute, however, must be deemed to cover one who goes voluntarily to the enemy country for an extended stay or a stay of indefinite duration. See *Ecker* v. *Atlantic Refining Company*, 222 F. 2d 618, 621 (C.A. 4), certiorari denied, 350 U.S. 847. Compare, *Commissioner of Internal Revenue* v. *Nubar*, 185 F. 2d 584 (C.A. 4), certiorari denied, 341 U.S. 925; *Buscaglia* v. *Fiddler*, 157 F. 2d 579, 581 (C.A. 1); *Commissioner of Internal Revenue* v. *Swent*, 155 F. 2d 513, 515 (C.A. 4), certiorari denied, 329 U.S. 801; *Commissioner* v. *Fiske's Estate*, 128 F. 2d 487 (C.A. 7), certiorari denied, 317 U.S. 635.[11]

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in enemy nations. Yet prisoners of war, expeditionary forces and "sojourners" were not, he said, intended to be included. 55 Cong. Rec. 4922.

[11] We fail to understand petitioner's heavy reliance on the following cases: *McGrath* v. *Zander*, 177 F. 2d 649 (C.A. D.C.); *Stadtmuller* v. *Miller*, 11 F. 2d 732 (C.A. 2); *Vowinckel* v. *First Federal Trust Co.*, 10 F. 2d 19 (C.A. 9), 15 F. 2d 872 (N.D. Cal.); *Sarthou* v. *Clark*, 78 F. Supp. 139 (S.D. Calif.); *Josephberg* v. *Markham*, 152 F. 2d 644 (C.A. 2). All were decided *prior* to this Court's decision in *Guessefeldt* v. *McGrath*, *supra*, and all were noted by this Court "without specifically approving any of them". (342 U.S. at 312). Whether the position stated in any of them as to "resident within" should be followed depends on whether it is consistent with this Court's interpretation in Guessefeldt. Nor is petitioner aided by *Kaku Nagano* v. *McGrath*, 187 F. 2d 759 (C.A. 7), affirmed, 342 U.S. 916. *Nagano* was also decided *before* this Court's decision in *Guessefeldt* v. *McGrath*, 342 U.S. 308. The affirmance of this Court by an equally divided vote (342 U.S. 916) approved only the result *i.e.*, that the case should go to trial; it did not imply approval of the principles of law stated by the Court of Appeals.

3. The property which petitioner is seeking to recover was vested by three vesting orders: one issued in 1947, another in 1950 and the third in 1951. Petitioner argues that, even if she had enemy status at the time of the 1947 vesting, the property vested in 1950 and 1951 was immune because she had left Germany in 1949. Otherwise stated, the question is whether the Alien Property Custodian's right to seize and retain property which was admittedly owned by a person who was an enemy during active hostilities may be defeated by a subsequent change of residence.

The question is not of general or current importance, and the only two cases on the point have held that a person who becomes an enemy during the war remains an enemy within the meaning of the Act, notwithstanding the fact that the conduct which brought about the enemy status ceased before the vesting of such person's property. *Hansen* v. *Brownell*, 234 F. 2d 60 (C.A.D.C.); *Sartrou* v. *Clark*, 78 F. Supp. 139 (S.D. Cal.). Cf. *Swiss Insurance Co.* v. *Miller*, 267 U.S. 42, 44. As Judge Fahy put it in the *Hansen* case, *supra* (234 F. 2d at p. 61):

> * * * We hold that a person who becomes an enemy agent during the war is an enemy within the meaning of the Act until the end of the war, though the conduct which brought about the agency relationship ceases before the vesting of such person's property [citation omitted]. There is nothing in the language of the Act which militates against this construction, and to hold otherwise would be inconsistent with the purposes and

> intent of the Act to reach assets of one who has acted for the enemy, and to make them available to assist in meeting the costs of war.

It is true that the enemy status involved in the two cases referred to above was acquired by virtue of being an "agent" of the enemy government, rather than by residence within enemy territory. But there is no basis in the language or the purposes of the Act for distinguishing between the continuance of enemy status based on agency and that based on residence.[12]

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[12] Petitioner cites prize cases for the proposition that enemy character ceases with residence. But those cases are distinguishable; they deal with the suppression of unlawful trade with persons in enemy territory. See *The Sally*, 8 Cr. 382, 384; *The Rapid*, 8 Cr. 155, 162, 163. Once a man had left enemy territory, at least if he was not an enemy citizen, it was no longer unlawful to trade with him. It does not follow that when Congress used the familiar word "resident" in Section 2, it meant to enact a limitation that enemy status ends with removal. "Resident" was also used with respect to captures on land, apparently as a test in addition to that of citizenship. *Juragua Iron Co.* v. *United States*, 212 U.S. 297, 305; *Miller* v. *United States*, 11 Wall. 268, 306.

The opinion of the Attorney General that enemy character was altered by a change in residence was issued before the decision of this Court in *Swiss Nat. Ins. Co.* v. *Miller*, 267 U.S. 42, and was not followed by the courts in that case. See, *Swiss Nat. Ins. Co.* v. *Miller*, 289 Fed. 571, 577 (C.A. D.C.). If enemy character is not altered by a removal from enemy territory after seizure of the property, it is hard to see why a removal before seizure should have that effect.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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